MUHAMMAD LUKMAN MOHAMAD v. PP

FEDERAL COURT, PUTRAJAYA
TENGKU MAIMUN TUAN MAT CJ
MOHD ZAWAWI SALLEH FCJ
HARMINDAR SINGH DHALIWAL FCJ
[CRIMINAL APPEAL NO: 05(M)-300-12-2019(B)]
21 JUNE 2021

CRIMINAL LAW: *Dangerous drugs – Trafficking – Convictions under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') – Factors considered in deciding whether charge to be preferred for trafficking or possession simpliciter – Whether amount of drugs reflective of charge – Failure by chemist to carry out quantitative analysis – Whether certainty of amount of drugs essential component of charge – Whether conviction to be reduced to one under s. 9 of DDA*

CRIMINAL LAW: *Dangerous drugs – Trafficking – Cannabis oil used for medicinal purpose – Whether cultivation of cannabis for medicinal purpose allowed – Whether controlled drug – Whether accused person authorised to possess, manufacture, handle, process or sell cannabis for medicinal purpose – Whether conduct in violation of Dangerous Drugs Act 1952*

CRIMINAL PROCEDURE: *Appeal – Appeal against conviction and sentence – Convictions under s. 39B(1)(a) of Dangerous Drugs Act 1952 ('DDA') – Factors considered in deciding whether charge to be preferred for trafficking or possession simpliciter – Whether amount of drugs reflective of charge – Failure by chemist to carry out quantitative analysis – Whether certainty of amount of drugs essential component of charge – Whether prosecution established case beyond reasonable doubt – Whether conviction to be reduced to one under s. 9 of DDA*

Following a raid by the police team and a recovery of several items at different areas of the house, a search list was prepared. The marked items were seized and handed over to the investigating officer ('SP9'). The chemist ('SP6') conducted chemical analysis on the items which were seized and suspected to be drugs. However, SP6 did not conduct quantitative analysis. The appellant was subsequently charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA') for three offences of trafficking in, *to wit*: (i) 3,010ml of Delta-9-Tetrahydrocannabinol; (ii) 1,422g of Delta-9-Tetrahydrocannabinol; and (iii) 279.81g of cannabis. The appellant's defence was, *inter alia*, that: (i) he did not know that there were drugs in the house; (ii) the items found in the house were sent by SD2, who had asked the appellant to fill the oil from the big bottles into smaller bottles; (iii) the appellant admitted that he knew the oil was cannabis but asserted it was used as medicinal purposes to cure various ailments and was sold online in the website 'Health-Care' and he presumed such act did not violate any law. At the end of the trial, the High Court Judge found that the three charges

A preferred against the appellant were made out and consequently convicted and sentenced him to death. Dissatisfied, the appellant appealed to the Court of Appeal against both the convictions and sentences. The Court of Appeal dismissed the appeal in respect of the first and second charges ('Delta-9 charges') but allowed the appeal on the third charge. The third charge was
B consequently set aside and substituted for possession of dangerous drugs punishable under s. 39A(2) the DDA. The appellant was sentenced to seven years imprisonment and ten strokes of the cane. Hence, the appellant's appeal against the convictions and sentences in respect of the two Delta-9 charges. The key issues posed for determination were: (i) whether in order to establish
C a drug trafficking charge under s. 39B(1)(a) of the DDA, it is incumbent on the prosecution to establish the net weight of the impugned drugs ('first issue'); (ii) whether on the factual matrix of the case, the appellant ought to be convicted under s. 9 of the DDA on the grounds that the amount or quantity of the dangerous drugs involved in the offence/offences could not be quantified or scientifically determined ('second issue'); and (iii) whether
D the dangerous drugs stated in the Delta-9 charges were medicinal cannabis and as such, could not be caught within the ambit of the DDA ('third issue').

Held (allowing appeal; substituting conviction for possession under s. 9 of DDA)

E **Per Mohd Zawawi Salleh FCJ delivering the judgment of the court:**

(1) The requisites that must be satisfied to sustain a conviction for the offence of trafficking in dangerous drugs under s. 39B(1)(a) of the DDA are: (i) the impugned drugs are dangerous drugs as listed in the First Schedule of the DDA; (ii) the impugned drugs are under the custody,
F control and possession of the appellant; and (iii) the appellant trafficked in the impugned drugs. (para 23)

(2) Based on the scope and scheme of the DDA, it is apparent that the Legislature intended to differentiate as between traffickers and mere addicts. The amount or quantity of dangerous drugs has bearing in the
G sentencing process, and it is one of the important factors to be taken into consideration by the prosecution in deciding whether he or she should be charged for trafficking or possession *simpliciter*. It stands to reason that when someone is found in possession of smaller amount or quantity of dangerous drugs, the logical assumption is that the possession is for
H personal consumption. By contrast, when someone is found in possession of a large or huge amounts of dangerous drugs, the logical assumption is that the possession is for the purpose of trafficking, as reflected under s. 37(da) of the DDA. (paras 25 & 26)

(3) The concept of reasonable doubt though not defined in the Evidence Act
I 1950, has been interpreted through various judicial decisions. Reasonable doubt is the state of mind of the jurors wherein they are not in a position to confirm the veracity of the guilt of the accused even after

careful perusal of all the adduced evidence. The weight or quantity of the impugned drugs is an important and essential ingredient of the charge. It represents the core of the prosecution's case. It was beyond argument that the amount or quantity of dangerous drugs as specified in the Delta-9 charge was an essential part of the alleged offence. The appellant could not be penalised for the omission or the failure by the chemist to carry out the quantitative analysis. (paras 27, 28 & 29)

(4) In all prosecutions for drug trafficking, the *corpus delicti* is the dangerous drug itself, the existence of which is essential to a judgment of conviction. Because of the seriousness of the penalty, the certainty of the amount or quantity of the impugned drug is very important and formed an essential part of the charge. Further, dangerous drugs are not readily identifiable. To determine their composition and nature, they must undergo scientific testing and analysis. Dangerous drugs are also highly susceptible to alteration, tampering or contamination. Therefore, a quantitative analysis is essential. An accused should know with certainty the case advanced against him by the prosecution, especially the amount or quantity of the impugned drugs in a trafficking charge. (paras 31 & 32)

(5) Where the stakes are high (death penalty), some precision is called for. Without quantitative analysis of the impugned drugs carried out by SP6 and with no other evidence as to the amount or quantity of the impugned drugs on the record to justify the quantity of Delta-9 stated in the first and second charges, the prosecution had failed to establish the case against the appellant beyond reasonable doubt. Therefore, the appellant could not be convicted for drug trafficking charges where the quantity of the dangerous drugs stated in the charges could not be quantified or scientifically determined. In the circumstances, at its highest, the appellant ought to be convicted under s. 9 of the DDA. (paras 33-35)

(6) As the law stands, cannabis is a controlled drug under the First Schedule of the DDA and in accordance with the provisions of that Act, the Minister charged with the responsibility for medical and health may authorise the cultivation of cannabis for medicinal purposes. However, to date, no such authorisation had been granted. The Government stance is to maintain the current status on cannabis and all drug-related substances as provided in the DDA. The court's function is not to assess the wisdom of Government policy unless they are found to be in contravention of the Federal Constitution and/or the laws. Hence, the decisions reached by the High Court and the Court of Appeal that the act of the appellant is subjected to the provisions of the DDA was correct. There was no authorisation granted to the appellant to possess, manufacture, handle, process or for the sale of the impugned drugs for medicinal purposes. In the premises, the conduct of the appellant was caught within the ambit of the DDA. (paras 41 & 44-46)

(7) Therefore, the appeal in respect of Delta-9 charges was allowed, whereas, the convictions and sentences rendered by the Court of Appeal were set aside and substituted with convictions for offences of possession under s. 9 of the DDA punishable under s. 9(2) of the DDA. Upon considering the mitigating factors and the aggravating factors, the appellant was sentenced to imprisonment for five years with effect from the date of his arrest for each of the charges. Both sentences were ordered to run concurrently. (paras 47 & 48)

Bahasa Melayu *Headnotes*

Berikutan satu serbuan oleh pasukan polis dan penemuan beberapa barang di tempat berbeza dalam rumah tersebut, satu senarai carian disediakan. Barang-barang yang ditanda itu, dirampas dan diserahkan kepada pegawai penyiasat ('SP9'). Ahli kimia ('SP6') melakukan analisis kimia terhadap barang-barang yang dirampas dan disyaki dadah. Walau bagaimanapun, SP6 tidak membuat analisis kuantitatif. Perayu kemudian dituduh bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') atas tiga kesalahan mengedar, iaitu: (i) 3,010ml Delta-9-Tetrahydrocannabinol; (ii) 1,422g Delta-9-Tetrahydrocannabinol; dan (iii) 279.81g kanabis. Pembelaan perayu adalah, antara lain: (i) dia tiada pengetahuan bahawa terdapat dadah di dalam rumah tersebut; (ii) barang-barang yang didapati dalam rumah itu dihantar oleh SD2 yang meminta perayu mengisi minyak dari botol-botol besar ke dalam botol-botol kecil; (iii) perayu mengakui bahawa dia mengetahui minyak itu adalah kanabis tetapi menyatakan bahawa itu digunakan untuk tujuan perubatan untuk mengubati pelbagai penyakit dan juga dijual dalam talian dalam laman sesawang 'Health-Care' dan dia mengandaikan tindakan sedemikian tidak bercanggah dengan undang-undang. Di akhir perbicaraan, Hakim Mahkamah Tinggi mendapati bahawa ketiga-tiga pertuduhan yang dikenakan terhadap perayu dibuktikan dan dengan itu, mensabitkan dan menjatuhkan hukuman mati. Tidak berpuas hati, perayu merayu ke Mahkamah Rayuan terhadap kedua-dua sabitan dan hukuman. Mahkamah Rayuan menolak rayuan berkaitan pertuduhan pertama dan kedua ('pertuduhan Delta-9') tetapi membenarkan rayuan atas pertuduhan ketiga. Pertuduhan ketiga, oleh itu, diketepikan dan digantikan dengan milikan dadah berbahaya yang boleh dihukum bawah s. 39A(2) ADB. Perayu dijatuhkan hukuman penjara tujuh tahun dan sepuluh sebatan rotan. Oleh itu, rayuan perayu terhadap sabitan dan hukuman berhubung dua pertuduhan Delta-9. Isu utama yang dikemukakan untuk pertimbangan adalah: (i) sama ada, untuk membuktikan pertuduhan pengedaran dadah bawah s. 39B(1)(a) ADB, adalah penting untuk pihak pendakwaan membuktikan berat bersih dadah yang dipersoalkan ('isu pertama'); (ii) sama ada atas fakta matriks kes, perayu wajar disabitkan bawah s. 9 ADB atas alasan bahawa jumlah atau kuantiti dadah berbahaya yang terlibat dalam kesalahan/kesalahan-kesalahan tidak boleh dikuantifikasi atau diputuskan secara saintifik ('isu kedua'); dan

(iii) sama ada dadah berbahaya yang dinyatakan dalam pertuduhan Delta-9 adalah kanabis perubatan dan, dengan itu, tidak boleh terangkum dalam ruang litup ADB ('isu ketiga').

Diputuskan (membenarkan rayuan; menggantikan dengan sabitan milikan bawah s. 9 ADB)

Oleh Mohd Zawawi Salleh HMP menyampaikan penghakiman mahkamah:

(1) Keperluan yang perlu dipenuhi untuk mengekalkan sabitan untuk kesalahan pengedaran dadah berbahaya bawah s. 39B(1)(a) ADB adalah: (i) dadah yang dipersoalkan adalah dadah berbahaya seperti yang disenaraikan bawah Jadual Pertama ADB; (ii) dadah yang dipersoalkan adalah bawah jagaan, kawalan dan milikan perayu; dan (iii) perayu mengedar dadah yang dipersoalkan.

(2) Berdasarkan skop dan skema ADB, jelas bahawa Badan Perundangan meniatkan pengedar dan penagih dibezakan. Jumlah atau kuantiti dadah berbahaya mempunyai kaitan dengan proses hukuman, dan itu adalah salah satu faktor yang perlu dipertimbangkan pihak pendakwaan apabila memutuskan sama ada satu-satu orang itu perlu dipertuduh terhadap pengedaran atau milikan. Adalah munasabah apabila seseorang didapati memiliki sejumlah atau kuantiti kecil dadah berbahaya, andaian logik adalah milikan itu untuk penggunaan sendiri. Sebaliknya, apabila seseorang didapati dalam milikannya sejumlah besar dadah berbahaya, andaian logik adalah itu untuk tujuan pengedaran, seperti yang dibayangkan bawah s. 37(a) ADB.

(3) Konsep keraguan munasabah walaupun tidak ditakrifkan dalam Akta Keterangan 1950, telah ditafsirkan melalui berbagai keputusan-keputusan kehakiman. Keraguan munasabah adalah keadaan pemikiran juri-juri apabila mereka dalam kedudukan untuk mengesahkan kesahihan kebersalahan tertuduh walaupun selepas penilaian teliti kesemua keterangan yang dikemukakan. Berat atau kuantiti dadah yang dipersoalkan adalah unsur pertuduhan penting dan utama. Itu mewakili tunjang kes pihak pendakwaan. Adalah melangkaui penghujahan bahawa jumlah atau kuantiti dadah berbahaya seperti yang dinyatakan dalam pertuduhan Delta-9 adalah bahagian penting kesalahan yang didakwa. Perayu tidak boleh dihukum ekoran ketinggalan atau kegagalan ahli kimia membuat analisis kuantitatif.

(4) Dalam kesemua pendakwaan pengedaran dadah, *corpus delicti* adalah dadah berbahaya itu sendiri, yang kewujudannya penting untuk penghakiman sabitan. Disebabkan keseriusan hukuman, kepastian tentang jumlah atau kuantiti dadah yang dipersoalkan adalah amat penting dan membentuk bahagian penting pertuduhan. Selanjutnya, dadah berbahaya tidak boleh terus dikenal pasti. Untuk menentukan

komposisi dan sifatnya, itu perlu diuji dan dianalisis secara saintifik. Dadah berbahaya juga amat terdedah pada pengubahan, pengusikan atau pencemaran. Oleh itu, analisis kuantitatif penting. Tertuduh perlu mengetahui dengan pasti kes yang dikemukakan terhadapnya oleh pihak pendakwaan, khususnya jumlah atau kuantiti dadah yang dipersoalkan dalam pertuduhan pengedaran.

(5) Apabila taruhannya tinggi (hukuman mati), perincian adalah penting. Tanpa analisis kuantitatif dadah yang dipersoalkan dibuat oleh SP6 dan tanpa apa-apa keterangan lain berhubung jumlah atau kuantiti dadah yang dipersoalkan atas rekod untuk menjustifikasi kuantiti Delta-9 dinyatakan dalam pertuduhan pertama dan kedua, pihak pendakwaan gagal membuktikan kes terhadap perayu melampaui keraguan munasabah. Oleh itu, perayu tidak boleh disabitkan terhadap pertuduhan pengedaran dadah berbahaya apabila kuantiti dadah berbahaya yang dinyatakan dalam pertuduhan tidak boleh dikuantifikasi atau diputuskan secara saintifik. Dalam keadaan tersebut, paling tinggi, perayu wajar disabitkan bawah s. 9 ADB.

(6) Mengikut undang-undang, kanabis adalah dadah terkawal bawah Jadual Pertama ADB dan menurut peruntukan Akta, Menteri yang dipertanggungjawabkan dengan perubatan dan kesihatan boleh memberi kuasa penanaman kanabis untuk tujuan perubatan. Walau bagaimanapun, sehingga hari ini, tiada kuasa sedemikian diberi. Pendirian Kerajaan adalah untuk mengekalkan status semasa mengenai kanabis dan kesemua bahan berkaitan dadah seperti yang diperuntukkan dalam ADB. Tugas mahkamah bukan untuk menilai kebijakan polisi Kerajaan kecuali jika itu bercanggah dengan Perlembagaan Persekutuan dan/atau undang-undang. Oleh itu, keputusan Mahkamah Tinggi dan Mahkamah Rayuan bahawa tindakan perayu tertakluk pada peruntukan-peruntukan ADB adalah betul. Perayu tidak diberi kuasa untuk memiliki, menghasilkan, menangani, memproses atau menjual dadah tersebut untuk tujuan perubatan. Dalam keadaan tersebut, tindakan perayu terangkum dalam ruang lingkup ADB.

(7) Oleh itu, rayuan berkaitan pertuduhan Delta-9 dibenarkan, manakala sabitan-sabitan dan hukuman-hukuman yang dikenakan oleh Mahkamah Rayuan diketepikan dan digantikan dengan sabitan atas kesalahan milikan bawah s. 9 ADB yang boleh dihukum bawah s. 9(2) ADB. Selepas mempertimbangkan faktor-faktor mitigasi dan faktor-faktor pemberatan, perayu dijatuhkan hukuman penjara lima tahun bermula dari tarikh tangkapan untuk setiap pertuduhan. Kedua-dua hukuman diperintahkan berjalan serentak.

Case(s) referred to:

Commonwealth v. Webstar, 59 Mass 295, 320 (1850) ***(refd)***
Dato' Seri Anwar Ibrahim v. PP & Another Appeal [2004] 3 CLJ 737 FC ***(refd)***
Federation of Railway Officers Association & Ors v. Union of India [2003] 4 SCC 289 ***(refd)***
Lt Kol Yusuf Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor [1997] 2 CLJ 752 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Nagappan Kuppusamy v. PP [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 SC ***(refd)***
Ng Yang Sek v. PP [1997] 2 SLR (R) 816 ***(refd)***
Ong Ah Chuan v. PP & Another Appeal [1980] 1 LNS 181 PC ***(refd)***
PP v. Chia Leong Foo [2000] 4 CLJ 649 HC ***(refd)***
PP v. Hasbi M Kusin & Anor [2008] 7 CLJ 366 HC ***(refd)***
R v. Severo Dossi [1981] 13 Cr App R 158 ***(refd)***
Saravanan Chandaram v. PP [2020] 2 SLR 95 ***(refd)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 2, 9(2), 37(da), 39A(2), 39B(1)(a), First Schedule

For the appellant - Hisham Teh Poh Teik, Kee Wei Lon, Mohammad Farhan Maaruf, Tania Scivetti, Low Wei Loke & Wan Azwan Aiman Fakhruddin; M/s Teh Poh Teik & Co
For the respondent - Samihah Rhazali & Aslinda Ahad; DPPs

[Editor's note: For the Court of Appeal judgment, please see Muhammad Lukman Mohamad v. PP [2020] 1 LNS 455 (overruled in part).]

Reported by S Barathi

JUDGMENT

Mohd Zawawi Salleh FCJ:

Introduction

[1] In this appeal, the key issues posed for our determination may be paraphrased as follows:

(i) whether in order to establish a drug trafficking charge under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("DDA 1952"), it is incumbent on the prosecution to establish the net weight of the impugned drugs ("first issue");

(ii) whether on the factual matrix of the case, the appellant ought to be convicted under s. 9 of DDA 1952 on the grounds that the amount or quantity of the dangerous drugs involved in the offence/offences cannot be quantified or scientifically determined ("second issue"); and

(iii) whether the dangerous drugs stated in the first and second charges (Delta-9 charges) were medicinal cannabis and as such cannot be caught within the ambit of DDA 1952 (third issue).

[2] For easy reference, we reproduce the charges thus:

1st Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari IB/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 3010 milliliter jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

2nd Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 1422 gram jenis DELTA-9-TETRAHYDROCANNABINOL dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya I952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

3rd Charge

Bahawa kamu pada 7 Disember 2015, pada jam lebih kurang 06.45 petang, bertempat di rumah No 50, Jalan Mentari IB/10 Bandar Mahkota, Banting di dalam Daerah Kuala Langat, di dalam Negeri Selangor Darul Ehsan telah didapati memperedarkan dadah berbahaya seberat 279.81 gram jenis Cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B (2) Akta yang sama.

The Facts

[3] The material facts germane to this appeal may be summarised thus. On 7 December 2015, a police team raided a house at No. 50, Jalan Mentari 1B/10 Bandar Mahkota, Banting, Kuala Langat, Selangor. In the house, the raiding team found the following items:

(i) In the hall

Apparatus and paraphernalias for smoking drugs.

(ii) Under the stair

Cardboxes contained numerous Pos Laju receipts and packages of caps of vape bottles.

(iii) At the kitchen

(a) Two trays filled with 90 bottles (filled with cannabis oil) and the said drugs were on an oven.

(b) A jar of biscuits, a slow cooker and a box containing oil.

(iv) Bedroom

(a) A yellow bag on the mattress; and

(b) Upon inspection of the bedroom, cannabis was found.

(v) Middle room

A glass cylinder bottle and boxes of wrapping papers.

[4] The leader of the police team, Inspector Mohd Hurairah Alinur bin Mohd Zaid (SP7), prepared a search list and marked the items which were seized and handed over the same to the investigating officer (SP9).

[5] The chemist, Khairul Hadi bin Hj Abdul Raof (SP6), conducted chemical analysis of the items which were seized and suspected to be drugs. At the outset, it must be noted that SP6 did not conduct quantitative analysis.

[6] The results of the analysis are as follows:

(i) "Tumbuhan mampat" marked as AA-1

Cannabis weighing 232g.

(ii) "Ranting bahan tumbuhan" marked as AA-2

Cannabis weighing 13.39g.

(iii) Plastic bag marked as H13 filled with "bahan tumbuhan hancur" and oil

Delta-9-Tetrahydrocannabinol weighing 505.3g.

(iv) Plastic bag marked as U-2

Delta-9-Tetrahydrocannabinol weighing 375.3g.

(v) Plastic bag marked as U-1 which consisted of "bahan tumbuhan hancur"

Delta-9-Tetrahydrocannabinol weighing 460.9g.

(vi) Box marked as "S" which contained plastic container marked as "S-1" filled with "ranting bahan tumbuhan"

Cannabis weighing 33.52g.

[7] In his defence, the appellant recalled that on the date stated in the charges, after he had opened the door, the police team entered the house and had inspected every part of the house. The appellant said he did not know that there were drugs in the house.

[8] With regard to the items found by the police team at different areas of the house, the appellant said the items were sent by Zainal Hafiz bin Zaini (SD2), as SD2 had moved house to Terengganu. SD2 had asked the appellant to fill the oil from the big bottles into smaller bottles as SD2 had no time to do so.

[9] The appellant admitted that he knew the oil is cannabis but asserted it was used as medicinal purposes to cure various ailments. The said oil was sold online on the website "Health-Care". The appellant presumed such act does not violate any law.

[10] The appellant denied the presence of the apparatus or paraphernalias used for smoking cannabis found in the hall of the house. The appellant said, other than the oil, he had no knowledge that the drugs seized by the police team were cannabis.

[11] The fact that the appellant had sold "medicinal cannabis" online *via* his Facebook was confirmed by Muhammad Fakrul Amin bin Mohd Tahir (SD3). He testified that he went to the appellant's house to help in the packing of the "oil" and posting to various customers. However, SD3 claimed that he did not know that the "oil" contained cannabis.

[12] In support of his claim that the "cannabis oil" could be used as medicine, appellant called Taufik bin Salleh (SD6), a patient who vouched for the effectiveness of taking cannabis oil for Beta-Thalassemia Intermedia and minor ailments.

[13] The appellant called an expert, Muhammad Aris bin Mohd Mokles (SD7) who is a lecturer of Universiti Putra Malaysia to testify that cannabis was acknowledged to have some health benefits in Malaysia. SD7 also disputed the methodology used by the chemist, SP6 in the extraction of the drugs in the form of liquid. According to SP7, the methodology used was insufficient and was outdated. According to SP7, SD2 should have used an additional methodology, namely HPL or High Performing Liquid Chromatography which was solvent.

Antecedent Proceedings

[14] At the end of the trial, the learned High Court Judge found that the three charges preferred against the appellant were made out and consequently convicted and sentenced him to death.

[15] Being dissatisfied with the decision, the appellant appealed to the Court of Appeal against both convictions and sentences. The Court of Appeal dismissed the appeal in respect of Delta-9 charges (the first and second charges) but allowed the appeal on the cannabis charge (the third charge). The third charge was consequently set aside and substituted for possession of dangerous drugs punishable under s. 39A(2) DDA 1952. The appellant was sentenced to seven years' imprisonment and ten strokes of the cane.

[16] Undaunted, the appellant appealed to this court against the convictions and sentences in respect of the two Delta-9 charges (the first and second charges).

Findings Of The Court Of Appeal

[17] The relevant parts of the Court of Appeal's reasoning for affirming the High Court's decision are reproduced as hereunder:

(i) Failure to establish the net weights of the dangerous drugs in the two charges

> The failure of the chemist, SP 6 to do any quantitative analysis of the drugs Delta-9-Tetrahydrocannabinol in the 1st and the 2nd charges is not fatal nor an issue because:
>
> (i) For the 1st and the 2nd charges, the dangerous drugs are Delta-9-Tetrahydrocannabinol which is listed under the 1st Schedule, Part III, DDA. There is no requirement under the law that requires the actual weight to be stated for charges of trafficking for such drugs;
>
> (ii) The provisions under sections 37 (da), 39A (2) also do not state or lists that Delta-9-Tetrahydrocannabinol to be stipulated as to its weight;
>
> In other words, even possession of 0.01 ml of Delta-9-Tetrahydrocannabinol would be sufficient to attract an offence under the DDA;
>
> (iii) The charges under the 1st and the 2nd charges against the appellant are offences under section 39B(1)(a) of the DDA. Hence, the elements that needs to be proved, with particular reference to Delta-9-Tetrahydrocannabinol are:
>
> (a) The drugs seized from the appellant are dangerous drugs as listed in the 1st Schedule of the DDA;
>
> (b) The dangerous drugs were under custody and control and possession of the appellant; and
>
> (c) The appellant is trafficking in the said drugs.
>
> (iv) In the present case, the learned trial Judge found that the prosecution had proved the elements of the offence for the 1st and the 2nd charges. This can be discerned from the findings of the learned trial Judge when he said:
>
> [22] Berasaskan kepada alasan-alasan di atas saya berpuas hati bahawa satu kes *prima facie* telah dibuktikan oleh pihak pendakwaan terhadap OKT bagi pertuduhan bagi pertama dan kedua.
>
> …
>
> [61] Di akhir kes pendakwaan yang lalu Mahkamah ini telah memutuskan satu kes *prima facie* terhadap OKT mengenai ketiga-tiga pertuduhan. Mengenai pertuduhan pertama dan kedua Mahkamah ini mendapati elemen kawalan dan

A jagaan OKT ke atas dadah-dadah tersebut adalah di bawah seksyen 2 Akta Dadah Berbahaya 1952 di mana salah satu elemen di dalam seksyen itu telah berjaya dibuktikan oleh pihak pendakwaan iaitu "Manufacturing" …

(v) Once the prosecution had proved the elements of possession and trafficking of the dangerous drugs Delta-9 Tetrahydrocannabinol, the amount or quantity of the same seized is irrelevant. The court is entitled to convict the accused person of DDA 1952 for trafficking.

(ii) The dangerous drugs in Delta-9 charges were medicinal cannabis

C (i) We do not find any flaw in such findings by the learned trial Judge as there is no supportive evidence from any medical bodies or from the Health Ministry to confirm the contention of the appellant that the drugs possess medicinal properties which is beneficial to the public. The act of the appellant in manufacturing the drugs is subjected to the laws of the country, with particular reference to the DDA. There is no exemption nor license granted to the appellant to possess, manufacture, handle, process or for the sale of the drugs under the DDA or any laws for that matter. There is also no authorisation provided under the DDA or any regulations thereunder which allows the appellant to possess the drugs.

E (ii) Therefore, the contention by the appellant that the manufacturing of the cannabis was for medicinal purposes for public good, is not caught within the mischief of the DDA, has no merits. There was no error by the learned trial Judge in making such findings which warrants our appellate intervention.

F **Our Analysis And Findings**

[18] Central to this appeal is the net weight of Delta-9 stated in the first and second charges. The net weight stated in the first charge is 3,010 millilitres of Delta-9. This is the sum total of the exhibits described as 'H', 'H1', 'H3' and 'H4' (see chemist reports p. 91 AR vol. 4). In respect of the second G charge, the net weight is said to be 1,422g of Delta-9 and this is the sum total of the exhibits described as 'H5', 'H11', 'H12' and 'H13.

[19] It is common ground that the chemist (P6) did not do any quantitative analysis of the exhibits. As we understand it, and simply put, the term "quantitative analysis" is often used in comparison or contrast with H "qualitative analysis" which seeks information about the identity or form of substance present. For instance, a chemist might be given an unknown solid substance. They will use "qualitative" techniques to identify the compounds present, and then "quantitative" techniques to determine the amount of each compound in the sample.

I **[20]** The fact that there was indeed no quantitative analysis is apparent from PW6's testimony during the trial. The relevant parts of PW6's testimony are now reproduced as hereunder:

(i) Page 52 AR vol. 3(1)

S: Daripada analisa kamu sendiri, kamu ada asingkan tak berapa percentage, berapa liter boleh quantify dadah jenis Delta-9-tetrahydrocannabinol daripada minyak-minyak itu?

J: Tidak buat sebab tidak ada keperluan pun untuk quantify kandungannya.

(ii) Pages 54-55 AR vol. 3(1)

S: Soalan mengapa saya tanya ada quantify, Delta-9-tetrahydrocannabinol, quantify ataupun tidak. Tujuan saya tanya tadi adalah kerana dalam pertuduhan menyatakan sebagai contoh, 3010 ml memperedarkan dadah berbahaya sebab 3010 ml Delta-9-tetrahydrocannabinol. Kenapa saya tanya quantify atau tidak, dalam minyak itu saya cadangkan kepada kamu bahawa 100% Delta-9-tetrahydrocannabinol?

J: Betul.

S: Maksudnya ada komposisi lain dalam minyak itu?

J: Ya, Delta-9-tetrahydrocannabinol adalah sebahagian daripada minyak tersebut.

S: So maksudnya is it safe to say, setuju dengan saya kalau saya katakan bahawa dalam kata kita ambil 3010 ml minyak dalam botol tersebut bukannya secara keseluruhannya adalah Delta-9-tetrahydrocannabinol?

J: Saya hanya merujuk kepada Laporan Kimia saya, contohnya H1, ayat terakhir setelah dianalisis saya dapati isipadu bersih cecair tersebut adalah sejumlah 300 ml yang mengandungi Delta-9-tetrahydrocannabinol.

Saya tidak mengatakan bahawa saya dapati isipadu bersih cecair tersebut adalah sejumlah 300 ml Delta-9-tetrahydrocannabinol, saya mengatakan yang mengandungi, saya pun tidak tahu berapa banyak kandungannya, saya cuma masukkan dalam laporan saya "yang mengandungi", bukan bermakna 300 ml Delta-9-tetrahydrocannabinol.

S: Maksudnya bukan keseluruhan 300 ml itu Delta-9-tetrahydrocannabinol?

J: Bukan.

S: Adakah at least the percentage Delta-9-tetrahydrocannabinol boleh didapati ataupun tidak daripada kita ambil contoh 300 ml.

J: Macam mana soalan?

S: Dalam Laporan Kimia dan dirujuk H1, yang dirujuk oleh kamu sebentar tadi, saya cadangkan kepada kamu bahawa dalam sejumlah cecair 300 ml kamu juga tidak dapat menentukan berapa percentage Delta-9-tetrahydrocannabinol pada 300 ml minyak tersebut?

J: Saya tidak dapat, saya tidak buat pun sebab pada saya tidak ada keperluan untuk saya buat ujian quantitation tersebut.

(iii) Page 57 AR vol. 3(1)

J: Itu adalah isipadu cecair isipadu sebenar cecair yang ada pada eksibit tersebut tapi saya tidak nyatakan kandungan sebenar Delta 9, THC.

(iv) Page 58 AR vol. 3(1)

S: My question what are the percentage of Delta-9-tetrahydrocannabinol are there in 3010 ml of that point?

J: Analisis itu memang saya tidak buat, untuk Quatitation itu memang tidak buat.

S: Saya cadangkan kepada kamu bahawa kamu tidak menjalankan ujian kuantitatif terhadap barang kes H1, H3, H4 dan H6?

J: Ya, betul.

[21] In his written statement, SP6 said:

Page 81 AR. vol. 4

Dari analisis ini didapati:

(i) Cecair dalam "H"(c) iaitu botol kaca "C", "H1", "H3" dan "H4" mengandungi Delta-9-tetrahydrocannabinol.

(ii) Kek/biskut dalam "H5" mengandungi Delta-9-tetrahydrocannabinol.

(iii) Bahan tumbuhan hancur dalam "H11", "H12" dan "H13" mengandungi Delta-9-tetrahydrocannabinol.

First And Second Issues

[22] Learned counsel for the appellant submitted that the weight or amount of the impugned drugs is an important ingredient of the charge. Learned counsel emphasised that without the amount or weight of the impugned drugs, the prosecution had not proved the first and second charges beyond reasonable doubt and as such the convictions and sentences rendered by the High Court and affirmed by the Court of Appeal cannot be sustained.

[23] In our view, there is force in the submission. The requisites that must be satisfied to sustain conviction for the offence of trafficking in dangerous drugs under s. 39B(1)(a) of DDA 1952 are well-settled. The following elements must be established:

(i) The impugned drugs are dangerous drugs as listed in the First Schedule of DDA 1952;

(ii) The impugned drugs are under the custody, control and possession of the appellant; and

(iii) The appellant trafficked in the said impugned drugs.

[24] The Court of Appeal opined at (para [52] (c)) of the judgment that "[o]nce the prosecution had proved the elements of possession and trafficking of the dangerous drugs Delta-9-Tetrahydrocannabinol, the amount or quantity of the same seized is irrelevant. The court is entitled to convict the accused person under s. 39B(1)(a) of the DDA for trafficking". A

[25] With respect, we disagree with the proposition of law above for five reasons. First, looking at the scope and scheme of DDA 1952, it is apparent that the Legislature intended to differentiate as between traffickers and mere addicts. The DDA 1952 provides much less severe penalties for the offences of consumption and possession as compared with punishments prescribed for trafficking. B C

[26] Second, generally speaking, the amount or quantity of dangerous drugs has bearing in the sentencing process, and it is one of the important factors to be taken into consideration by the prosecution in deciding whether he or she should be charged for trafficking or possession *simpliciter*. It stands to reason that when someone is found in possession of smaller amount or quantity of dangerous drugs, the logical assumption is that the possession is for personal consumption. By contrast, when someone is found in possession of large or huge amount of dangerous drugs, the logical assumption is that the possession is for the purpose of trafficking. Section 37(da) of DDA 1952 reflected this legislative policy where it provides that if a person is found with specified amount or quantity of certain drugs, he or she shall be presumed until the contrary is proved to be trafficking in the said drug. Of course, the prosecution can prove by direct evidence the act of trafficking as defined in s. 2 of DDA 1952. However, without the aid of statutory presumption, the prosecution will face a more difficult task to succeed in proving drug trafficking charge. As stated by Lord Diplock in the seminal Privy Council case of *Ong Ah Chuan v. PP & Another Appeal* [1980] 1 LNS 181; [1981] MLJ 64 that apart from the statutory definition of the term "trafficking", the ordinary meaning of the verb "traffic" imports the existence of a supplier and a person to whom the goods are to be supplied. Thus, without the aid of statutory presumption, the prosecution carries the legal burden to prove that an accused intended to transfer the impugned drugs to another person in order to succeed to establish trafficking as defined by s. 2 of DDA 1952 (see *PP v. Hasbi M Kusin & Anor* [2008] 7 CLJ 366; [2008] 7 MLJ 331). D E F G H

[27] Third, well-entrenched in jurisprudence is the principle that the burden is on the prosecution to prove beyond reasonable doubt of every essential fact necessary to constitute the crime with which he or she is charged (see *Nagappan Kuppusamy v. PP* [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229; [1988] 2 MLJ 53). This principle is a cornerstone in our criminal law. The prosecution must rely on the strength of its own evidence and not I

relying on the weakness of the defence (see *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311; [1991] 3 MLJ 169; *PP v. Chia Leong Foo* [2000] 4 CLJ 649). The concept of reasonable doubt though not defined in the Evidence Act 1950, has been interpreted through various judicial decisions. In *Commonwealth v. Webstar*, 59 Mass 295, 320 (1850), the court opined that reasonable doubt is not meant to be comprehended as a mere possible doubt (as all that is connected to the affairs of humans can be said to contain a possible element of doubt). Reasonable doubt is the state of mind of the jurors wherein they are not in a position to confirm the veracity of the guilt of the accused even after careful perusal of all the adduced evidence. In *Lt Kol Yusuf Abdul Rahman v. Kol Anuar Md Amin, Yang Dipertua Mahkamah Tentera Pulau Pinang & Anor* [1997] 2 CLJ 752; [1997] 1 MLJ 562 (CA), Mahadev Shankar JCA said (at p. 767 (CLJ); p. 573 (MLJ)):

> In view of this definition the best explanation of 'reasonable doubt' is perhaps that given by Denning J in *Miller v. Minister of Pensions* [1947] 2 All ER 372 where he said (at p. 373):
>
> > (The degree of cogency) … need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence "of course it is possible, but not in the least probable", the case is proved beyond reasonable doubt, but nothing short of that what will suffice' (see also *Tang Kin Seng v. Public Prosecutor* [1997] 1 SLR 46 (HC)).

[28] Further, it is beyond argument that the amount or quantity of dangerous drugs as specified in the Delta-9 charges (the first and second charges) is an essential part of the alleged offence. In the case of *Dato' Seri Anwar Ibrahim v. PP & Another Appeal* [2004] 3 CLJ 737, one of the issues canvassed was whether the "date" of the commission of the offence was material and consequently whether the charges were proved. The Court referred to Atkin J's judgment in *R v. Severo Dossi* [1981] 13 Cr App R 158 where His Lordship said:

> From time immemorial a date specified in an indictment has never been material unless it is actually an essential part of the alleged offence.

[29] Likewise in the present case. The weight or quantity of the impugned drugs is an important and essential ingredient of the charge. It represents the core of the prosecution's case. The appellant cannot be penalised for omission or the failure by chemist to carry out the quantitative analysis.

[30] We are unable to comprehend the reason as to why SP6 did not do any quantitative analysis of the exhibits, and as such cannot confirm its weight or quantity. The evidence on record revealed that the investigating officer had requested the chemist to determine the nature of the drugs and the net weight of the impugned drugs (see p. 85 AR Vol. 4 (Pol. 3 – ex. P58). Under para 5, the investigating officer requested:

> **Bagi menentukan jenis dadah dan berat bersihnya.**
>
> (emphasis added)

SP6 did not say that quantitative analysis could not be done. In fact, he said he did not do so (see pp. 54-55 AR vol. 3(1).

[31] Fourth, in all prosecutions for drug trafficking, the *corpus delicti* is the dangerous drug itself, the existence of which is essential to a judgment of conviction. Because of the seriousness of the penalty, the certainty of the amount or quantity of the impugned drug is very important and formed an essential part of the charge. Further, dangerous drugs are not readily identifiable. To determine their composition and nature, they must undergo scientific testing and analysis. Dangerous drugs are also highly susceptible to alteration, tampering or contamination. Therefore, a quantitative analysis is essential.

[32] Fifth, it is a fundamental principle of our criminal law that an accused should know with certainty the case advanced against him by the prosecution, especially the amount or quantity of the impugned drugs in a trafficking charge. In this regard, we refer to Singapore case of *Saravanan Chandaram v. PP* [2020] 2 SLR 95. The accused in that case was charged, *inter alia*, for importing into Singapore, ten bundles containing not less than 3295.7g of fragmented vegetable matter which was analysed and found to contain (CBN) and (THC), an offence under the Misuse of Drugs Act. This charge was described as the cannabis mixture charge. He was convicted by the High Court. One of the reasons the Court of Appeal set aside the conviction on the cannabis mixture charge was that the weight could not be determined. This is what the learned Chief Justice of Singapore said:

> 187 This is significantly compounded by the problem of the indeterminacy of the quantity of the Created Fragmented Vegetable Matter. It is impossible to ascertain accurately the quantity of vegetable fragments that were created as a result of the HSA's testing procedure and the quantity of vegetable fragments that were already present in the ten bundles when the Appellant brought them into Singapore. Any estimate of the quantities of cannabis and cannabis mixture at the time of the offence extrapolated from their respective quantities after the HSA's testing would inevitably be arbitrary.
>
> 188 For both these reasons, we are satisfied that the Importation of Cannabis Mixture Charge cannot be established.

> 191 In our judgment, these submissions by the Prosecution do not address the two points we have highlighted at (186)-(187) above. Charges cannot be brought on the basis of approximations. In order to establish a drug importation charge, it is incumbent on the Prosecution to prove that the accused person knew the nature of the drugs in question, and to establish accurately the relevant drug involved at the time of the offence. These are difficulties that the Prosecution cannot surmount where the drugs in question consist of cannabis-related plant material containing both cannabis and cannabis mixture, and they affect the Dual Charging Practice generally, and in this case specifically, the Importation of Cannabis Mixture Charge.

[33] We agree and endorse the sentiments expressed by learned Chief Justice of Singapore. We hasten to add that where the stakes are high (death penalty), some precision is called for. Without quantitative analysis of the impugned drugs carried out by SP6 and with no other evidence as to the amount or quantity of the impugned drugs on the record to justify the amount or quantity of Delta-9 stated in the first and second charges, the prosecution had failed to establish the case against appellant beyond reasonable doubt.

[34] In conclusion, we hold that the appellant cannot be convicted for drug trafficking charges where the amount or quantity of dangerous drugs stated in the charges cannot be quantified or scientifically determined.

[35] In the circumstances, we agree with the alternative submission of learned counsel for the appellant that at its highest, the appellant ought to be convicted under s. 9 of DDA 1952.

Third Issue

[36] Learned counsel for the appellant submitted that on 2 December 2020, the majority of the Member States of the United Nation's Commission on Narcotic Drugs agreed to remove cannabis and its derivatives from Schedule IV of the Single Convention on Narcotic Drugs. The lift on the six decades prohibition was to recognise and explore the drug's medicinal and therapeutic potential in line with the recommendations by the World Health Organisation (WHO). The WHO recognised the medical potential of cannabis.

[37] Learned counsel further submitted that the evidence on record revealed that the appellant was selling medical online to help cure the patients who have suffering from various kinds of ailments.

[38] Learned counsel posited that the conduct of the appellant was not caught within the DDA 1952 and "the appellant's conduct should not attract disapprobation that is reserved for the drug dealers who exploit the vulnerability of addicts and who spread the poison of narcotic addiction in society" (citing the passage in *Ng Yang Sek v. PP* [1997] 2 SLR (R) 816).

[39] We are made to understand that there are proposals and reforms to the status and authorisation of cannabis by the previous Government (Pakatan Harapan Government which formed the Government for 22 months from May 2018 to February 2020). According to the then Minister of Health, Dr. Dzulkefly Ahmad, any changes to the law would have to refer to the Attorney-General's Chambers (see https://www.thestar.com.my, dated 19 September 2018). The Minister said the Cabinet had discussed the matter but did not reach any decision (see https://m.malaysiakini.com.my, dated 21 September 2021).

[40] On 18 February, 2021, Prime Minister Tan Sri Muhyiddin Yassin said that the Government will maintain its current stance on cannabis and all drug-related substances as enforced by DDA 1952. He said these substances had clearly brought much harm to society, this despite the 63rd Session of the Commission on Narcotic Drugs held in Vienna in 2021 voting to remove cannabis and cannabis resin from its Schedule IV of the 1961 Single Convention on Narcotic Drugs 1961 (see https://www. malaymail. com.my, dated 18 February 2021).

[41] As the law stands now, cannabis is a controlled drug under the First Schedule of DDA 1952 and in accordance with the provisions of that Act, the Minister charged with the responsibility for medical and health ("the Minister of Health") may authorise the cultivation of cannabis for medicinal purposes, however to date, no such authorisation has been granted.

[42] The primary authority with jurisdiction over cannabinoid drugs is the National Pharmaceutical Regulatory Agency ("NPRA") established under the Ministry of Health. We are not aware of any list of doctors or persons who are authorised to prescribe cannabinoid drugs.

[43] To the best of our knowledge, currently there was no substantial research in Malaysia showing that cannabis oil has proven to cure any patients who have suffering from any kinds of ailments.

[44] The Government's stance is to maintain the current status on cannabis and all drug-related substances as provided in the DDA 1952. This is a Government policy. It is settled law that the court's function is not to assess the wisdom of Government policy unless they are found to be in contravention of the Federal Constitution and/or the laws (see *Federation of Railway Officers Association & Ors v. Union of India* [2003] 4 SCC 289).

[45] We agree with the decisions reached by the High Court and the Court of Appeal that the act of the appellant is subjected to the provisions of DDA 1952. There is no authorisation granted to the appellant to possess, manufacture, handle, process or for the sale of the impugned drugs for medicinal purposes.

[46] In the premises, the conduct of the appellant is caught within the ambit of DDA 1952.

[47] In the light of our decisions on issues 1 and 2, we allowed the appeal in respect of Delta-9 charges (the first and second charges) and set aside the convictions and sentences rendered by the Court of Appeal and substituted convictions for offences of possession under s. 9 of DDA 1952 punishable under s. 9(2) of the same Act.

[48] After considering the mitigating factors advanced by learned counsel and the aggravating factors submitted by learned Deputy Public Prosecutor, we sentenced the appellant with imprisonment for five years with effect from the date of his arrest (7 December 2015) for each of the charges. Both sentences to run concurrently.